

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

October 14, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Maui

Authorize the Chairperson of the Department of Land and Natural Resources to Negotiate the Terms and Conditions, and Sign a Memorandum of Understanding between the Department, Kahoma Land LLC and Pioneer Mill Company LLC / Kaanapali Land Management Corporation, for the remediation of Wahikuli Dam and Reservoir (HI ID #0055), Lahaina, Maui County, located at TMK Nos. (2) 4-5-21:002 and 022.

Applicant:

The Department of Land and Natural Resources (Department), Land Division

Legal Reference:

Section 171-6, Hawaii Revised Statutes, as amended

Location:

The Wahikuli Dam and Reservoir is situated on TMK No. (2) 4-5-021:002 (por.) owned by the State of Hawaii ("State") and on TMK No(2) 4-5-21:022 (por.) owned by Kahoma Land LLC ("Kahoma")

Background:

Act 213, SLH 2007, Item K-6, as amended by Act 158, SLH 2008 appropriated \$14,530,000 for the Dam Assessments, Maintenance and Remediation Improvements, Statewide, for the purpose of satisfying the State's obligations under Act 262, the "Hawaii Dam and Reservoir Safety Act of 2007". The purpose of this Act is to provide for the inspection and regulation of construction, enlargement, repair, alteration, maintenance, operation and removal of all dams and reservoirs to protect the health, safety, and welfare of the citizens of the State by reducing the risk of failure of all dams or reservoirs.

Governor's Memorandum, dated December 18, 2009, delegated this funding to the Department of Accounting and General Services ("D.A.G.S."). Since the Department, through its Engineering Division's Dam Safety Program, is responsible for the inspection and regulation of all of the State's dams and reservoirs, D.A.G.S. Public Works Division was delegated the responsibility for managing the assessment, repair, alteration and/or removal of the dams and reservoirs under the Department's jurisdiction because there appeared to be the potential for a "conflict of interest" for the Department to also be responsible for the party conducting the actual assessment and remediation of these dams and reservoirs.

Part of this \$14,530,000 funding is to remediate the Wahikuli Dam and Reservoir ("Structure"), which is jointly owned by the State and Kahoma, collectively, the "Parties". Pioneer Mill Company / Kaanapali Land Management Corporation ("PMCo") is also included as party to this MOU because of its exclusive water interests that include the Structure.

In early January 2010, Land Division met with Kahoma and PMCo to discuss the future of this facility and unanimously agreed to remove this Structure, as neither Kahoma, PMCo or the State desired to bear the exorbitant cost to remediate the Structure, or the ongoing expenses and continuing liability to maintain the Structure. Therefore, D.A.G.S. Project Management Branch directed the consultants to design a removal plan.

In April, 2010, Kahoma rescinded their concurrence for removal of the Structure, and asked the Land Division to allow them to develop a benefit cost analysis for the long term viability of the Structure to the West Maui community. Subsequently, they hired their own consultant to provide alternate design plans. The Land Division advised Kahoma that it was too late to change courses – from removal to an alternate plan – and that the State will continue on the course of removal. Attached is a "draft" copy of the Memorandum of Understanding, which addresses the Parties' public obligation and financial responsibilities, going forward.

Recommendation that the Board:

Authorize the Chairperson to negotiate terms and conditions, and sign on behalf of the Department and the Board of Land and Natural Resources ("Board") a Memorandum of Understanding between the Board, Kahoma Land LLC and Pioneer Mill Company / Kaanapali Land Management Corporation, subject to review and approval as to form by the Department of the Attorney General.

Respectfully Submitted,



Lydia M. Morikawa
Special Projects and Development Specialist

APPROVED FOR SUBMITTAL:



Laura H. Thiel, Chairperson

Attachment

**MEMORANDUM OF UNDERSTANDING
REGARDING THE WAHIKULI DAM AND RESERVOIR
TMK: (2) 4-5-021:002 & 022**

This Memorandum of Understanding ("MOU") is made and entered into as of the _____ day of _____, 2010, by and between the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, by its Board of Land and Natural Resources ("State") and KAHOMA LAND LLC ("Kahoma") who jointly own lands that the Wahikuli Dam and Reservoir is situated. PIONEER MILL COMPANY LLC / KAA NAPALI LAND MANAGEMENT CORP ("PMCo") is also party to this MOU, because of its exclusive water interests that include the Wahikuli Dam and Reservoir. The State and Kahoma are collectively referred to as the "Parties".

WHEREAS, the Wahikuli Dam and Reservoir ("Structure") is located in Lahaina, Maui County, and is jointly owned by the State and Kahoma (see Exhibit A). The location of this Structure is identified as:

1. Tax Map Key No. (2) 4-5-021:002 - Kahoma and
2. Tax Map Key No. (2) 4-5-021:022 - State

WHEREAS, the State, through the Department of Land and Natural Resources, Engineering Division, contracted GEI Consultants, Inc. to complete a Final Phase I Inspection Report of the Wahikuli Reservoir (October 2009). The report determined that the Structure was in POOR condition and showed evidence of lack of maintenance and is deteriorating. These conditions increase the risk to life, property and environmental damage should a dam failure occur. The divided land ownership and maintenance responsibilities are clearly the largest dam safety issue at Wahikuli. Additionally, Kahoma and PMCo entered into an exclusive easement for the water interests which includes this Structure, and operations and maintenance responsibilities are unclear.

WHEREAS, the State, through the Department of Land and Natural Resources, Land Division, met with Kahoma and PMCo (as the operators of the water system) in early January 2010, to discuss the future of this Structure. Neither Kahoma, PMCo or the State want to bear the exorbitant cost to remediate the Structure, or the ongoing expenses and continuing liability to maintain the Structure. Therefore, it was agreed to remove the Structure, with the option to re-commission the Structure, subject to all applicable laws, rules and regulations, in the future, should the need arise. Based on this agreement, the State initiated a contract for consultant services to provide a removal design in accordance with the State's Dam Safety directives.

WHEREAS, on April 5, 2010, Kahoma withdrew their concurrence for the removal plan of the Structure, stating that they wanted to explore a benefits cost analysis for the long-term viability of the Structure. This change in position was based on a more in depth analysis of the importance of maintaining the Structure and the impacts it will have on the long-term functionality of an existing, cost effective and reliable water resource for West Maui residents and farmers. The State responded that to change courses and consider any alternate solution was too late, and that funding for the project will lapse on June 10, 2010. Both parties mutually agreed that the State continue with the removal plan, while Kahoma explored their options.

WHEREAS, on June 22, 2010, Kahoma withdrew their non-concurrence of the removal plan, and as co-land owner agreed with the State's plan, with several conditions and requests, which are outlined below.

WHEREAS, on June 24, 2010, the bid opening for the Wahikuli Dam and Reservoir project occurred, and the lowest bid amount was \$455,400.00.

THEREFORE, the Parties desire to document their understanding of the terms and conditions of the Wahikuli Dam and Reservoir Project ("Project"), since there are considerable risks to life, property and the environment, which must be addressed and resolved expeditiously.

Kahoma agrees to:

1. Pursue the option of providing a viable alternate design that will reduce harm to the Structure and facilitate the possible future use, entirely at its own expense, for the State's consideration and with approval by the Dam Safety Section. Kahoma further agrees to be solely responsible for any costs associated with any additional improvements and repairs, such as the outlets, embankment stabilization issues, etc., required for the continued impoundment of water in the Structure, in accordance with dam safety standards.
2. Assure the State that the proposed alternate design is not significantly modified from the removal plan that was advertised and bid, and that the alternate design is in compliance with all procurement laws and limitations. Additionally, Kahoma agrees to pay all increases in the Project costs over the existing bid figure of \$455,400.00 which may result from Kahoma's modifications to the removal design.
3. Kahoma shall provide to the State a conceptual plan of its alternate design within 20 days from the date of this MOU. The State shall review the conceptual plan and respond either approving or disapproving the plan, with comments. Upon receipt of the State's approval of Kahoma's plan, Kahoma shall prepare and submit to the State completed construction plans and any other plans within 60 days. Time is of the essence.
4. Obtain all permits and approvals required for and complying with all laws applicable to the Project, at its own expenses, do all things necessary to carry out and complete the alternate plan in a timely and expedient manner, should the alternate design be approved.
5. Assume operations and maintenance responsibilities to manage the short-term liability risks during this interim, and fund any and all expenses, with the State's concurrence.
6. Propose and carry out at its own expense, a final removal plan should the long term solution to utilize the Structure does not work out. Kahoma further agrees to secure this obligation with a bond or financial guaranty to the State, in the amount of \$455,400.00, during these negotiations and until the Project is completed.
7. Allow the State to move forward with the original removal design and will not knowingly impede, prohibit, or obstruct the removal project to proceed accordingly. Should Kahoma's actions impede, prohibit, or obstruct the removal project to the extent that the State's funding lapses, Kahoma agrees to reimburse the State the bid amount of \$455,400.00.

The State agrees to:

1. Provide Kahoma with any requested information, data and resources regarding the Structure that has already been completed at its own expense.
2. Provide funding of up to \$455,400.00 for the construction project, which was awarded to the lowest bidder, subject to approval of the alternate design, and in accordance with all procurement laws and requirements. Should the job be re-bid due to any unforeseen circumstances, the State will not be required to participate financially in the alternate design. The State agrees to continue to work with Kahoma and its consultant and the State's consultant and contractor.
1. Continue to move forward with the original removal design. The State will obtain all permits and approvals required for and complying with all laws applicable to the removal project, at its own expense. Additionally, the State agrees not to bill Kahoma for the State's portion of the removal construction cost, and will bear all costs of the original removal up to the agreed funding for the original removal design. Also, if Kahoma does not go forward with the alternate design because the State disapproved the alternate design, or it is determined that the alternate design will require a rebid of the entire project, or Kahoma determines that proceeding with the alternate project is not feasible for any reason, then the State shall proceed with and pay for the removal itself, and Kahoma shall have no further responsibility for the Project's completion.

IN WITNESS WHEREOF, the State, Kahoma and PMCo have executed this MOU as of the date first above written.

Approved by the Board of Land and Natural
Resources at its meeting held on _____.

Approved as to Form:

By: _____
Deputy Attorney General

Date: _____

STATE OF HAWAII, BOARD OF LAND AND
NATURAL RESOURCES

By: _____
Name: Laura H. Thielen
Title: Chairperson

KAHOMA LAND LLC

By: _____
Name:
Title:

PIONEER MILL COMPANY LLC /
KAANAPALI LAND MANAGEMENT CORP.

By: _____
Name:
Title:

Exhibit A – Location of Wahikuli Dam & Reservoir

